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# Executive Immunity for Constitutional Torts after Butz v. Economou

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# EXECUTIVE IMMUNITY FOR CONSTITUTIONAL TORTS AFTER *BUTZ V. ECONOMOU*

> *I wish the State of Society was so far improved, and the science of Government advanced to such a degree of perfection, as that the whole nation could in the peaceful course of law, be compelled to do justice, and be sued by individual citizens.*
>
> Chief Justice Jay[1]

## INTRODUCTION

The United States Constitution is almost completely silent concerning damage remedies to be employed for implementation of its guarantees.[2] Vindication of constitutional rights damaged by a government executive officer has historically come about through either judicial implication or specific legislation. The primary difficulty in developing such sanctions against a federal executive is identifying a defendant within a hierarchical federal system against whom one can bring a cause of action for violation of constitutionally defined interests.

A basic doctrine of governmental responsibility in tort is that the individual officer or employee is liable for injury arising out of his own negligence.[3] Opportunities for such injury continually expand in the wake of a growing federal bureaucracy with enhanced rule-making and rule-enforcing powers.[4] Despite this expansion of powers, the tendency to confer immunity upon an officer, until recently, was growing. This oc-

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1. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), held that article III and the Judiciary Act of 1789 granted jurisdiction for an action by South Carolina citizens to recover on bonds which had been confiscated by the state of Georgia. The Chief Justice noted that permitting suit "enables each and every [citizen] to obtain justice, without any danger of being overborne by the weight and number of their opponents." *Id.* at 478.

2. *See* Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1118-22 (1969).

3. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949); Brady v. Roosevelt S.S. Co., 317 U.S. 575 (1943).

4. *See* Power, *New Wealth and New Harms—The Case for Broadened Governmental Liability*, 23 RUTGERS L. REV. 449, 453 (1969).

curred without a concomitant growth of other remedies through particular legislation or judicial creation of civil actions based on constitutionally defined interests.

In the past, courts considered whether the cause of action necessarily involved conduct actionable either at common law[5] or through statute[6] without looking to the Constitution; yet conduct should be "actionable as a deprivation of constitutional rights where no force or violence has been utilized, and there exists no orthodox counterpart of state common law or statutory relief available."[7] The United States Supreme Court has begun to embrace this latter viewpoint by fastening upon the executive officer an obligation to pay damages for injurious constitutional deprivations. The most recent decision in this area, *Butz v. Economou*,[8] holds federal executive officials are entitled only to *qualified immunity* in a suit for damages arising from unconstitutional action.

The purpose of this comment is fourfold: first, it will refine a definition of constitutional tort as that concept has been applied in recent decisions. Second, the comment will document judicial attacks on executive immunity with a focus on liability for constitutional torts. Third, *Butz v. Economou* is discussed as expanding the levels of immunity in constitutional claims against federal executive officials. Finally, suggestions will be offered to develop standards for deciding constitutional tort controversies.

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5. The Supreme Court has looked to the common law in constructing immunities. *See* Imbler v. Patchmen, 424 U.S. 409, 417-19 (1976), and the cases there discussed; *see generally* Friendly, *In Praise of Erie—and of the New Federal Common Law*, 19 REC. A.B. CITY N.Y. 64, 79-92 (1964).

42 U.S.C. § 1988 (1970) authorizes courts to look to the common law of the states where this is "necessary to furnish suitable remedies." In other cases, the interests protected by a particular constitutional right may not also be protected by an analogous branch of the common law of torts. *See* Monroe v. Pape, 365 U.S. 167, 196 n.5 (1961) (Harlan, J., concurring); *id.* at 250-51 (Frankfurter, J., dissenting in part); Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 394 (1971); *id.* at 408-09 (Harlan, J., concurring).

6. J.I. Case Co. v. Borak, 377 U.S. 426 (1964); Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210 (1944). *But see* Wyandotte Transp. Co. v. United States, 389 U.S. 191, 201-04 (1967). *See generally* Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317 (1914).

7. Howell v. Cataldi, 464 F.2d 272, 278 (3d Cir. 1972)(complaint against police stated cause of action by alleging an infliction of cruel and unusual punishment proscribed by the eighth amendment). *See* Katz, *The Jurisprudence of Remedies: Constitutinal Legality and the Law of Torts in Bell v. Hood*, 117 U. PA. L. REV. 1 (1968).

8. 438 U.S. 478 (1978).

## TORT RECOGNITION CRITERIA

### *Defining a Constitutional Tort*

A tort requires that a plaintiff have a legally protected right which, when invaded by the defendant, is compensable by money damages.[9] The civil remedy for *constitutional* torts is the direct claim by the victim of the official wrongdoing to secure compensation for the denial of his *constitutional* rights. The distinction is that the source of the legal duty owed the plaintiff is the Constitution.[10]

Initially, it is important to differentiate between conduct which is actionable in state courts as a tort, and that which is actionable in federal courts as a constitutional injury sounding in tort. In examining the invasion of constitutionally protected interests, there is an important premise: these rights are constitutionally created, but subject to private vindication. "It thus appears that what is developing is a kind of 'constitutional tort.' It is not quite a private tort, yet it contains tort elements; it is not 'constitutional law,' but employs a constitutional test."[11] In theory, these interests are akin to the private rights protected by the law of torts, established either by common law or statute. Yet, unlike the varying strictures of private tort law, there is a public policy of broad interpretation where constitutional rights are to be protected.[12] The essential and distinguishable feature, then, for this type of tort action is the breach of some *constitutional* duty or obligation owed the plaintiff.

Another feature distinguishing the two classes of tort is the qualitative difference of the rights involved. Some common law and statutory torts, although actionable in a state forum, do not rise to constitutional dimensions. The converse is equally true. For example, allegations of a violation of a cit-

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9. W. PROSSER, THE LAW OF TORTS § 1, at 4 (4th ed. 1971).

10. *See* Comment, *Sovereign Immunity—An Anathema to the "Constitutional Tort"*, 12 SANTA CLARA LAW. 543 (1972).

> The ability of federal courts to provide remedies for governmental violations of constitutionally protected rights is essential to the existence and continuance of those rights; this ability is perhaps the most important element of due process in its most meaningful form.

*Id.* at 560.

11. Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60, NW. U. L. REV. 277, 323-24 (1965).

12. *See* Valle v. Stangel, 176 F.2d 697, 702 (3d Cir. 1949).

izen's first amendment protection against governmental restrictions on freedom of speech or a perpetration of the "ultimate form of constitutional injury . . . the taking of life without due process,"[13] contrast with an alleged impairment to plaintiff's reputation by government officials through the common law tort of defamation.[14] The qualitative difference of the rights involved is perhaps the main reason why the courts have allowed the former two to plead their case, while foreclosing the latter through absolute immunity.[15]

The court's role in redressing constitutional injuries should be to determine the precise nature of the action and the constitutional deprivation asserted. It must then ascertain which of the named defendants are legally cognizable parties to the proceeding. Finally, the court must determine the level of immunity to be afforded the official(s). This structuring of the constitutional tort claim should be the same for both state and federal officials.

*Legal Structure for Recognition of Constitutional Tort Liability*

One very important assumption underlies the constitutional tort cause of action; the public interest requires action and decision making by executive officers for the protection of the citizenry.[16] Any resolution of the questions of liability and immunity must, therefore, take into account the functions and responsibilities of the defendants in their capacities as government officials. These officials should only be entitled to immunity for alleged constitutional deprivations if they act in good faith and upon reasonable grounds, even if this restraint may result in inaction by public officers charged with a considerable amount of responsibility and discretion.

The only defense afforded state executive officers for acts performed in the course of official conduct has been the existence of reasonable grounds for a good-faith belief that the

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13. Verkuil, *Immunity or Responsibility for Unconstitutional Conduct: The Aftermath of Jackson State and Kent State*, 50 N.C. L. REV. 548, 593 (1972).

14. Paul v. Davis, 424 U.S. 695 (1976).

15. 403 U.S. at 409 (Harlan, J., concurring).

In *Monroe*, Justice Harlan emphasized that the relief afforded by state law would "be far less than what Congress may have thought would be a fair reimbursement for deprivation of a constitutional right." 365 U.S. at 196 n.5.

16. *See* Scheuer v. Rhodes, 416 U.S. 232, 242 (1974).

action would not result in injury to a citizen's constitutional rights. This qualified immunity is based on common law, which has been incorporated by the courts in analyzing constitutional tort claims.[17]

The eleventh amendment, prohibiting suits against one state by citizens of another state, provides no shield for a state official confronted by a constitutional tort claim.[18] The rationale of the eleventh amendment prohibition is that the state can neither act unconstitutionally nor authorize such action.

> The applicable principle is that where state officials, purporting to act under state authority, invade rights secured by the Federal Constitution, they are subject to the process of the Federal Courts in order that the injured may have appropriate relief.[19]

Thus it would appear that the eleventh amendment is subordinate to the rights secured to citizens by other provisons of the Constitution.

Federal courts also applied the above-mentioned common law considerations to structure a cause of action for civil liability against federal officers for constitutional deprivations. That is, while the injured party is granted a cause of action under the general federal question jurisdiction,[20] the officer may prove in defense both his subjective good-faith belief that his conduct was lawful and the objective reasonableness of this belief under the circumstances. Thus, federal officials receive no greater zone of protection from constitutional claims than their counterparts in state government.

*Section 1983.* The principal federal statute authorizing a damage remedy for deprivation of constitutional rights is sec-

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17. As the Court in *Ex parte* Young, 209 U.S. 123, 124 (1908) stated:
> The attempt of a state officer to enforce an unconstitutional statute is a proceeding without authority of, and does not affect, the state in its sovereign or governmental capacity, and is an illegal act and the officer is stripped of his official character and is subjected in his person to the consequence of his individual conduct. The State has no power to impart to its officer immunity from responsibility to the supreme authority of the United States.

18. Pierson v. Ray, 386 U.S. 547 (1967). *See* text accompanying notes 27-31 *infra.*

19. Sterling v. Constantin, 287 U.S. 378, 393 (1932).

20. Bell v. Hood, 327 U.S. 678 (1946).

tion 1983 of the Civil Rights Act of 1871.[21] The legislative history of section 1983[22] demonstrates that it was intended to create "a species of tort liability" in favor of persons deprived of "rights, privileges, or immunities" secured to them by the Constitution.[23] The terms of section 1983 require proof of two elements for recovery: first, that the defendant deprived plaintiff of a right secured by the "Constitution and laws" of the United States; and second, that the defendant deprived him of this right "under color of any law . . . ."[24] Once there is a recognition of the right sought to be vindicated, the proof of the section 1983 deprivation "should be read against the background of tort liability that makes a man responsible for the natural consequences of his acts . . . ."[25] This standard has been construed to include negligent or reckless abuse of official position.[26]

Due to section 1983's tort standard of constitutional deprivation, the status of state officials *qua* defendants had to be

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21. 42 U.S.C. § 1983 (1970)(originally enacted as Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

22. Section 1983 originated as a legislative response to post-Civil War "outrages" occuring in Southern States because local law enforcement agencies were either unable or unwilling to enforce the state laws against whites who were accused of depriving blacks of their political rights. *See* CONG. GLOBE, 42d Cong., 1st Sess. 166-67, 428 app. (1871); Monroe v. Pape, 365 U.S. at 172-83; Mitchum v. Foster, 407 U.S. 225, 238-42 (1972).

23. Imbler v. Pachtman, 424 U.S. 409, 417 (1976).

24. Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970).

25. 365 U.S. at 187.

26. As the court stated in Pritchard v. Perry, 508 F.2d 423, 425 (4th Cir. 1975):

> There is no warrant for a separation of constitutional rights into redressable rights and nonredressable rights, of major and minor unconstitutional deprivation, and section 1983 makes no such distinction and authorizes no such separation. By its very terms it applies indiscriminately to a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws.

*See* McCray v. Maryland, 456 F.2d 1, 6 (4th Cir. 1972) (clerk of court liable for negligently impeding filing petition for postconviction relief); Whirl v. Kern, 407 F.2d 781, 791-92 (5th Cir. 1968), *cert. denied*, 396 U.S. 901 (1969) (sheriff liable for keeping plaintiff imprisoned due to negligent failure to learn of dismissal of charges). *See also* Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5, 16-25 (1974).

reevaluated in light of the traditional common law defenses. These defenses were first considered in *Pierson v. Ray*.[27] In an action against police officers, the *Pierson* Court held that common law privileges and defenses to actions for false arrest were included in the statute.[28] Noting that at common law a policeman was not personally liable for arrests made in good faith and with probable cause, the Court denied liability, "even though the arrest in fact was unconstitutional."[29]

Thus, the defense initially incorporated into section 1983 actions for constitutional torts contained subjective and objective elements. The defendant was required to prove both that he acted in good faith and that his belief in the legality of his actions was reasonable.[30] The difficulty with this incorporation of common law was that it frustrated a major purpose of section 1983, which was to overcome the deficiencies and vagueness of relief from constitutional violations available to plaintiff under state law.[31] Application of state laws to a federal statute designed to alleviate the inadequacies of state law was much different from the mere reference to the background of tort liability. Clearly, a standard had to be found for constitutional tort actions that would be based on constitutional policies applicable to state officials at all levels of government.

The question was resolved by basing the official's defense both upon the functions and responsibilities of the office and

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27. 386 U.S. 547 (1966). Plaintiffs had been arrested by state police for breach of peace under a state "segregated facilities" statute. After their convictions were overturned and the statute later declared unconstitutional (*see* Thomas v. Mississippi, 380 U.S. 524 (1965)), they sued the trial judge and the arresting officers under section 1983 for false arrest. Since the arrest and convictions were unconstitutional, the only legal issue presented was whether the officials were protected by some level of immunity. 386 U.S. at 550. The judge was found to be absolutely immune, since he was acting within his judicial jurisdiction. *Id.* at 553-55.

28. 386 U.S. at 550.

29. *Id.* at 557.

30. Theis, *"Good Faith" as a Defense to Suits for Police Deprivations of Individual Rights*, 59 MINN. L. REV. 991, 1004-05 (1975).

Probable cause is traditionally defined in terms of the reasonableness of the belief of the arresting officer. Draper v. United States, 358 U.S. 307 (1959). An inquiry into the officer's belief of the reasonableness of his action cannot be made without reference to the facts that prompted the officer to act.

31. *See* text accompanying note 10 *supra*. Qualls v. Parish, 534 F.2d 690, 694 (6th Cir. 1976) (officer permitted to shoot at auto if he relied on "settled law of his state").

the purposes of section 1983.[32] The court in *Scheuer v. Rhodes* discussed the former consideration by suggesting that "since the options which a chief executive must consider are broader than lower executive officers . . . his range of discretion must be comparably broad."[33] By basing the level of immunity in part on the official's hierarchical position in government, the court made available a qualified immunity "dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based."[34] This standard allows a court to consider many factors other than discretion to determine if the official acted reasonably, including the specific matters involved in the official's decision, the extent to which the threat of liability would unduly inhibit the decision-making process, the seriousness of the constitutional violation, and the availability of reasonable alternatives to the official at the time he made his decision. These factors should be weighed against the importance of compensating the victim and deterring future constitutional violations.[35]

Thus, the qualified immunity of a police officer in *Pierson* and that of a high level official in *Scheuer* differ to the extent that there are clearer legal standards governing the reasonableness of an arrest than there are governing the reasonableness of controlling civil disorder. Also, while a policeman is not held to the same degree of legal knowledge as a governor, he does not exercise as much discretion. Since the standard for judicial inquiry remains the same in each case, the scope of the official's discretion and responsibility in great part determines the standards under which his conduct is evaluated.

An important factor that led to much post-*Scheuer* con-

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32. 416 U.S. at 243. This case arose out of the Kent State University tragedy. Various Ohio state officials, ranging from the governor to enlisted members of the National Guard, were sued under section 1983 for wrongful deaths of plaintiff's decedents. The complaint alleged suppression of a civil disturbance in an unconstitutional manner.

33. *Id.* at 247.

34. *Id.*

One should note that neither the statutory language of section 1983 nor its legislative history refer to any motive or state of mind requirement as a defense to liability. CONG. GLOBE, 42d Cong., 1st Sess. 365-66, 385, 390 app. (1871). *See* Comment, *The Evolution of the State of Mind Requirement of Section 1983*, 47 TUL. L. REV. 870 (1973).

35. *See* text accompanying notes 139-50 *infra*.

fusion[36] was the subjective criterion, good faith. *Wood v. Strickland*[37] resolved this confusion by structuring a test including both a subjective good-faith belief in the constitutionality of his official action and an objective basis for his belief in that good faith. *Wood* overcomes some of the difficulties presented by the *Pierson* common law defense in that the reasonableness of an executive's belief is measured in light of the "clearly established constitutional rights" of the aggrieved person.[38] Ignorance of the law is no longer controlling when objective circumstances indicate that the official knew or should have known that constitutional rights were being violated.

After *Wood,* the plaintiff's new difficulty is the burden of proving the existence of established constitutional law upon which the alleged right exists. To satisfy section 1983, one may have to prove: 1) that the defendant knew or should reasonably have known of the constitutional right, 2) reasonable grounds for believing the act or decision would result in an unconstitutional deprivation, 3) violation of a constitutional right under color of state law, and 4) damage proximately caused. Even if the plaintiff proves these elements, a qualified immunity may still be affirmitively established by the defendant.[39]

Although *Pierson* to some extent clarified the parameters of liability for law enforcement officials, *Scheuer* and *Wood* articulated that the immunity extended to executive officials as a defense on the merits involves proof of state of mind.[40]

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36. As to this confusion, *see* Gaffney v. Silk, 488 F.2d 1248, 1250-51 (1st Cir. 1973); Smith v. Losee, 485 F.2d 334 (10th Cir. 1973), *cert. denied,* 417 U.S. 908 (1974). Puckett v. Mobile City Comm'n, 380 F. Supp. 593 (S.D. Ala. 1974).

37. 420 U.S. 308 (1975). *Wood* held that students who had summarily been expelled from school for "spiking the punch" at a dance could maintain an action for damages against school board members for violation of their rights to procedural due process.

38. 420 U.S. at 317-18. It is interesting to note that the *Wood* Court applied the requirements of *Pierson* and *Scheuer* to a case in which the alleged constitutional violation did not involve a direct physical invasion of an individual's person, but rather the deprivation of an intangible right to procedural due process.

39. One must remember that even when the plaintiff is a victim of a constitutional tort, the doctrine of immunity by its very nature implies that the defendant can be free from liability. *See* Sapp v. Renfroe, 511 F.2d 172 (5th Cir. 1975).

40. 416 U.S. at 247-48. A number of lower courts purporting to apply the *Scheuer* holding have overlooked the "reasonable grounds" requirement, citing either *Scheuer* or *Woods* as establishing merely a good faith defense. Mims v. Bd. of Educ., 523 F.2d 711, 716 (7th Cir. 1975); Laverne v. Corning, 522 F.2d 1144, 1150 (2d Cir.

Because the duty imposed was set out by the Constitution, the issue became whether federal executive officials would be held to the standard developed under section 1983. Do constitutional tort actions only apply to civil suits against *state* officials? When the same violations are committed by federal officials, does a court look to section 1983 for a remedy?[41] The next section provides answers to these questions by analyzing the development of federal constitutional tort liability.

*Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics.*[42] When federal agents are defendants in actions for constitutional deprivations, judicial conviction that these agents should be governed by the same rules which federal courts have previously applied to state officials has been a persuasive force in forming the scope of constitutional torts.[43] Before recognizing damage remedies, federal courts had long recognized that activities violating the Constitition are wrongs,[44] yet these same courts rarely recognized that resulting harms could be compensated by monetary damages.[45] This latter determination was based both on the policy of preserving effective government by negating the threat of civil liability and the doctrine of separation of powers.[46]

If an officer is acting unconstitutionally he is not acting within his federal authority and has therefore lost any of his sovereign-employer's immunity from suit. Actions against a federal official may then have their origin in the Constitution.[47] Since the court has equitable power over an official pre-

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1975).

41. Roots v. Calahan, 475 F.2d 751 (5th Cir. 1973); Savage v. United States, 450 F.2d 449 (8th Cir. 1971), *cert. denied*, 405 U.S. 1043 (1972).

42. 403 U.S. 388 (1971).

43. States Marine Lines, Inc. v. Shultz, 498 F.2d 1146, 1157 (4th Cir. 1974). This suit was brought by a ship's charterer against the Treasury Secretary and the Customs Service. The court stated: "[I]t would be incongruous indeed if the federal government were left completely unrestrained under identical wording of the Fifth Amendment following the seizure of goods by customs officers." *Id.* at 1154.

44. *See, e.g.*, Weeks v. United States, 232 U.S. 383 (1914).

45. However, where Congress had through specific legislation authorized money damages for constitutional violations, they were awarded. *See* West v. Cabell, 153 U.S. 78 (1894); Lammon v. Feusier, 111 U.S. 17 (1884). *See also* Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972).

46. *See* text accompanying notes 69-73 *infra* for a discussion of the doctrines of sovereign immunity and separation of powers.

47. United States v. Lee, 106 U.S. 196 (1882). Here the Court sustained an ejectment action against federal officials in possession of the Arlington estate of Robert E. Lee. Even though the government had record title due to foreclosing on an

paring to act unconstitutionally,[48] it should follow that the court has power over him when he has so acted. Under the general federal question jurisdiction conferred by 28 U.S.C. section 1331(a),[49] the Court in *Bell v. Hood*[50] held that federal courts had jurisdiction over one who brought suit against individual federal agents who had allegedly violated his fourth amendment rights. Yet, until 1971, the question remained unanswered as to whether a nonstatutory federal damage remedy would lie to redress a constitutionally defined interest that was injured in tort.

In 1971, the Court in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[51] held that a violation

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alleged tax lien, the Court made it clear that the case involved enforcing the fifth amendment prohibition of taking without just compensation as applicable "both to the executive and legislative" branches. *Id.* at 220. This enforcement was compared to the protection of constitutional liberty of the person by writ of habeus corpus. *Id.* at 218.

*See, e.g.*, Malone v. Bowdoin, 369 U.S. 643 (1962); Dugan v. Rank, 372 U.S. 609 (1963).

A different approach to the poetics of these decisions is offered by Roady, *Lee, Land, Larson, and Malone—Sovereign Immunity Revisited*, 43 TEX. L. REV. 1062 (1965).

48. Historically, judicial remedies against federal officers in federal courts were equitable in nature. *See, e.g.*, Rickert Rice Mills, Inc. v. Fontenot, 297 U.S. 110 (1936).

49. 28 U.S.C. § 1331(a) (1976) provides:

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

In most litigation in which plaintiff will want to state a cause of action directly under the Constitution, the matter at issue will not easily lend itself to traditional concepts of monetary valuation. For example, what is the monetary value of a particular constitutional right such as that to a speedy trial, freedom from unreasonable search and seizure, or freedom of assembly?

50. 327 U.S. 678, 682-83 (1946). On remand, the district court determined that the complaint did not state a federal claim for relief. It reasoned that only governmental activity gives rise to a constitutional violation; and, since federal officers violating the Constitution are acting beyond the scope of their authority, their acts are not the acts of the government and therefore cannot be unconstitutional. Bell v. Hood, 71 F. Supp. 813 (S.D. Cal. 1947).

*See, e.g.*, United States v. Faneca, 332 F.2d 872 (5th Cir. 1964), *cert. denied*, 380 U.S. 971 (1965); Johnston v. Earle, 245 F.2d 793 (9th Cir. 1957); Koch v. Zuiback, 194 F. Supp. 651 (S.D. Cal. 1961), *aff'd* 316 F.2d 1 (9th Cir. 1963); Garfield v. Palvieri, 193 F. Supp. 582 (E.D.N.Y. 1960), *aff'd per curiam*, 290 F.2d 821 (2d Cir.), *cert. denied*, 368 U.S. 827 (1961).

51. 403 U.S. 388 (1971). Federal agents had ransacked Bivens' apartment dur-

of the fourth amendment prohibition of unreasonable searches and seizures by federal officers is an actionable federal offense[52] cognizable in federal courts despite the absence of a specifically created statutory cause of action.[53] Prior to *Bivens*, such damage claims had to be adjudicated in state court, utilizing state tort law. Since *Bivens* was decided in terms of "a federally protected interest,"[54] it created a judicial forum to redress any constitutional tort committed by federal executive officials, not just fourth amendment violations.[55] The *Bivens*-type action could thereupon be viewed as creating a new species of federal tort claims: one where the necessary legal duty is imposed by the Constitution and the violation of this duty permits a cause of action for damages.

The Court employed three strong rationales to justify its departure from pre-*Bivens* case law. First, one acting in the name of the federal government has the potential ability to bring about substantially greater harm than the ordinary citizen.[56] Second, the fourth amendment serves as an "independent limitation upon the exercise of federal power."[57] Finally, state laws that coincidentially protect fourth amendment rights may operate in a manner hostile to those constitutional

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ing a warrentless search, arrested him without probable cause, subjected him to an unnecessarily humiliating personal search, detained him unlawfully, and then released him without filing charges.

52. The Court used the phrase "under color of his authority." *Id.* at 389. The opinion thus adhered to the traditional concept, derived from the section 1983 cases, that an agent of the government who acts unconstitutionally cannot be within the scope of his authority, since the government cannot authorize unconstitutional acts. *See, e.g.*, Pennoyer v. McConnaughy, 140 U.S. 1, 9-18 (1891); *In re* Ayers, 123 U.S. 443, 500-02 (1887). *See generally Developments in the Law—Remedies Against the United States and its Officials*, 70 HARV. L. REV. 827, 837 (1957).

53. The Court in *Bivens* stated: "For we have here no . . . congressional declaration that persons injured . . . may not recover money damages from the agents." 403 U.S. at 397. *See* Dellinger, *supra* note 45. The propriety of a damage remedy would depend upon whether the plaintiff was in the position of one protected by the substantive law and whether there were other effective means of redress. *Id.* at 1551.

54. 403 U.S. at 400.

55. The Court had previously created the powerful remedy of the exclusionary rule to prevent the use in a criminal trial of evidence gained in violation of the constitutional rights of the accused. *See* Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914).

As a direct rather than indirect sanction, a damage remedy could be effective where the exclusionary rule is either inapplicable or ineffective. Damages would not only provide a supplement, but possibily a substitute for the rule.

56. 403 U.S. at 392.

57. *Id.* at 392-94.

rights.[58]

As damage awards would further the intent of the Constitution,[59] it was not required that the remedy structured be calculated to serve as a deterrent against future constitutional violations.[60] In this regard, the Court turned to *J. I. Case v. Borak*,[61] a decision indicating a judicial propensity to grant damages despite the absence of an authorizing statute.[62] This remedial power, once asserted, has allowed federal district courts to award monetary damages against the responsible federal official.

It is important to note that *Bivens* did not discuss the level of immunity available to federal officials. The case was remanded for that determination.[63] The courts of appeal considering this question have held that the agents were not ab-

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58. *Id.* at 394. An action for trespass, for example, normally fails if the officer can prove that he demanded entry and received it, even though by federal standards he clearly violated the individual's constitutional rights. *Id. But see* Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955).

59. 403 U.S. at 395-96. Justice Harlan, in his concurring opinion, discussed the Court's power to recognize a tort from the Constitution. *Id.* at 402-06. Two members of the Court were of the opinion that the Court's recognition of a tort from the Constitution was an encroachment upon the legislative powers of Congress and thus an unconstitutional exercise of judicial power. *Id.* at 422 (Burger, C.J., dissenting); *Id.* at 428 (Black, J., dissenting).

60. *Id.* at 395-96. The Court stated:

> [I]t's . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.

*Id.* at 396 (quoting from Bell v. Hood, 327 U.S. at 684).

The Court also cited Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood*, 117 U. PA. L. REV. 1 (1968). Katz argues that the Constitution created interests in liberty cognizable in law in the same manner as did the Magna Carta in England. Just as the Magna Carta became part of the common law, he asserts that the Constitution transformed a political ethic into a recognized legal form. Tracing the growth of remedies in England to protect these interests in liberty, Katz argues that the same considerations "directly refutes the notion that laws that place limits on governmental activity are somehow different from private law." *Id.* at 9-10.

61. 377 U.S. 426 (1964). *Borak* permitted a damage recovery to a shareholder claiming violations of the proxy requirements of section 14(a) of the Securities and Exchange Act of 1934.

62. *See generally* Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963).

63. On remand, the appellate court in *Bivens* held that the officers were acting within the scope of their duties while making the arrest, in that the officials were fulfilling their tasks as narcotics agents. *Bivens v. Six Unknown Named Agents*, 456 F.2d 1339, 1343 (2d Cir. 1972). Nevertheless, the court found the officers only had a qualified defense, dependent upon their good faith and reasonable belief in the validity of the arrest and search. *Id.* at 1348.

solutely immune and that the public interest would be protected if these agents were granted only a qualified immunity.[64]

The apparent implication of *Bell* and *Bivens* is that the recognition of claims based directly on the Constitution under general federal question jurisdiction enables the federal court to utilize the judicial power to draft appropriate remedies. The source of this power is to be found, if at all, in article III of the Constitution: "The judicial Power shall extend to all Cases . . . arising under this Constitution . . . ."[65] An action involving the violation of constitutional rights that is based directly on a constitutional provision is one that "[arises] under the Constitution."[66]

In considering whether a damage remedy would be appropriate in a particular situation, courts have emphasized the availability of similar relief against state officials.[67] The effect of the *Bivens* decision was to make the prescribed conduct of federal officers conform to the constitutional standard applicable to state officers under section 1983. The analogy is reasonable because the Bill of Rights imposes many of the same constraints on federal agents that the fourteenth amendment, through incorporation, exerts on state officers. This ensures that the victim of unconstitutional conduct has a federal damage remedy available regardless of whether the perpetrator was a federal or state officer.[68] Once jurisdiction is established, the issues become whether the plaintiff's claim states a cause of action under the Constitution and whether a defendant can avoid the claim by asserting some level of immunity.

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64. *E.g.*, GM Leasing Corp. v. United States, 560 F.2d 1011 (10th Cir. 1977); Jones v. United States, 536 F.2d 269 (8th Cir. 1976); Black v. United States, 534 F.2d 524 (2d Cir. 1976); Paton v. La Prade, 524 F.2d 862 (3rd Cir. 1975); Mark v. Groff, 521 F.2d 1376 (9th Cir. 1975).

65. U.S. CONST. art. III, § 2. *See* Dellinger, *supra* note 45, at 1541.

66. Bell v. Hood, 327 U.S. at 681-82.

67. *See* Butz v. Economou, 438 U.S. at 500-01.

68. It is possible to argue that the fourth amendment's limitations on the exercise of federal authority are the result of a demand for uniformity in federal law. Here the basis of the personal rights themselves remain part of the common law. This common law is necessarily state law by the terms of Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938). *See*, Note, *The Truly Constitutional Tort*, 33 U. PITT. L. REV. 271, 278 (1971).

## RESTRAINTS ON THE IMPOSITION OF LIABILITY

### *Sovereign and Executive Immunity*

A majority of suits against the federal government were formerly foreclosed due to the "jurisdictional" concept[69] of sovereign immunity that precluded suit against the United States without demonstrated legislative consent.[70] The doctrine of sovereign immunity is an exception to the fundamental concept of tort law that liability follows tortious conduct and that individuals and corporations are responsible for the acts of their employees acting in the course of their employment. The most fundamental objection to the sovereign immunity doctrine is that it obfuscates the real issues: whether particular governmental activity should be subject to judicial review, and, if so, what form of relief is appropriate.

There is no constitutional justification for sovereign immunity;[71] it owes its continued existence to a perceived need

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69. A discussion in Comment, *Immunity of Government Officers: Effects of the Larson Case*, 8 STAN. L. REV. 683, 686 (1956), very ably points out that:

> [B]oth the plaintiff's cause of action and his ability to negate the defense of sovereign immunity depended upon his ability to show action in excess of authority. The courts therefore made a preliminary determination of "jurisdiction" on the pleadings. Unless the actions alleged *could not* be said to be in excess of the statutory authority pleaded by the defendants, the court admitted jurisdiction and proceeded to a finding on the merits. Thus there was really no jurisdictional question of sovereign immunity separate from the question on the merits. The merits depended upon whether the defendant had departed from the authority found to be his under a proper construction of the statute alleged to have been violated. (emphasis in original).

70. In the absence of an act of Congress, an officer of the federal government cannot waive the government's immunity from suit. Stanley v. Schwalby, 162 U.S. 255, 270 (1896). Case v. Terrell, 78 U.S. (11 Wall.) 199 (1871), establishes the obligation of an appellate court on its own motion to raise the issue of the immunity of the United States, even though the immunity objection is not asserted by government lawyers.

A federal statute may limit the consent of the federal government to suits brought against it in federal courts. Minnesota v. United States, 305 U.S. 382, 388 (1939). For the power of a state to prescribe the terms of its consent, *see* Beers v. Arkansas, 61 U.S. (20 How.) 527 (1857).

As to the continued viability of sovereign immunity, *see generally* Note, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060 (1946), which proposes that there is only one policy basis for the doctrine today: "subjection of the federal government to private damage suits 'might constitute a serious interference with the performance of [its] its functions and with [its] control over [its] respective instrumentalities, funds, and property.' " *Id.* at 1061 (citation omitted).

71. Edwin M. Borchard, in the first of several articles on government liability in

for judicial self-restraint in cases of potentially serious interference with the administration of government.[72] It has been stated that the doctrine of sovereign immunity is such a strong impediment to suits against the government that it can even bar suits that are based on violations of constitutional rights.[73]

Application of an automatic sovereign immunity standard for federal officials might be explained by the federal judiciary's reluctance to interfere in the internal affairs of a co-equal branch of government. Yet, recent decisions have highlighted the weakness of the argument, even though these cases have arisen in a context somewhat different from that of a civil damage claim. In *United States v. Nixon*,[74] the Court held that "the doctrine of separation of powers . . . without more, [cannot] sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances."[75] If the President cannot successfully invoke the doctrine to avoid producing confidential communications, it is difficult to imagine how separation of powers can be used to protect sub-cabinet rank officials from constitutional torts. Also, it has been unquestioned since *Marbury v. Madison*[76] that even cabinet members are not completely immune from suit.

Thus, while the United States enjoys sovereign immunity,

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tort, observed that

> [n]othing seems more clear than that this immunity of the King from the jurisdiction of the King's courts was purely personal. How it came to be applied in the United States of America, where the prerogative is unknown, is one of the mysteries of legal evolution.

Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 4 (1924). *See also* L. JAFFEE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 353-75 (1965); Saferstein, *Nonreviewability; A Functional Analysis of "Committed to Agency Discretion"*, 82 HARV. L. REV. 367 (1968).

72. Byse, *Proposed Reforms In Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensible Parties, Mandamus*, 75 HARV. L. REV. 1479, 1484 (1962).

73. *See* Hill, *supra* note 2, at 1112. Apparently, the theoretical justification for this position is that the doctrine of sovereign immunity was well recognized and regularly used at the time the Constitution was adopted. Principality of Monaco v. Mississippi, 292 U.S. 313, 322-23 (1934). On the other hand, it has been argued that Congress does not have the power to limit jurisdiction where to do so would prevent the vindication of a constitutional right. *See* Dellinger, *supra* note 45, at 1556-57.

74. 418 U.S. 683 (1974) (denied the President the claim of executive privilege in refusing the Special Prosecutor's attempt to subpoena documents and tapes).

75. *Id.* at 706.

76. 5 U.S. (1 Cranch) 137 (1803).

its officers do not. They are answerable, as private individuals, for wrongs committed in the course of their official work, just as a private agent is answerable for a wrong committed by him on behalf of or at the command of his principle.[77] The sovereign immunity doctrine comes into play when the court regards the suit, though against the official in name, as, in reality, against the United States.[78]

Yet a corresponding executive immunity is often afforded the government official that may foreclose any relief.[79] The crucial question becomes: In determining the reasonableness of an executive officer's good faith, should a member of the judiciary inquire into the reasonableness of the officer's action? The reasonableness of his action may, in some cases, be determinative of the litigation's outcome.[80] This will become an even more important consideration as more officials are exposed to personal liability for constitutional torts.

Immunity originally only protected those officials executing federal statutory duties from criminal or civil actions based on state law;[81] the judicially created doctrine of executive immunity is derived from the absolute immunity afforded

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77. A public official who acts under an unconstitutional statute or outside his authority is personally subject to the consequences of his conduct. *Ex parte* Young, 209 U.S. at 159-60; Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 843, 868 (1824).

As the Court stated in Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 693 (1949):

> The mere allegation that the officer, acting officially, wrongfully holds property to which the plaintiff has title does not meet that requirement. True, it establishes a wrong to the plaintiff. But it does not establish that the officer, in committing that wrong, is not exercising the powers delegated to him by the sovereign. If he is exercising such powers, the action is the sovereign's . . . .

78. Davis, *Sovereign Immunity in Suits Against Officers for Relief Other Than Damages*, 40 CORNELL L.Q. 3, 9 (1954).

79. Democracy by its very definition implies responsibility. *See generally* Laski, *The Responsibility of the State in England*, 32 HARV. L. REV. 447 (1919). In this day of increasing power wielded by governmental officials, absolute immunity for nonjudicial, nonlegislative officials is outmoded and even dangerous. *See generally* Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 215-18 (1963); James, *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610 (1955); Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263 (1937).

80. Davis, *Administrative Officers' Tort Liability*, 55 MICH. L. REV. 201, 207-12 (1956); Jaffe, *supra* note 79, at 216-17.

81. *See* Bates v. Clark, 95 U.S. 204 (1877) (wrongful seizure of alcohol off Indian land); Little v. Bareme, 6 U.S. (2 Cranch) 170 (1804)(commander of American warship liable in trespass for wrongfully seizing Danish cargo).

judges for acts done in the exercise of their judicial jurisdiction.[82] The extention of executive immunity from common law torts was based on two policy considerations.[83] First, the injustice of imposing liability on officers legally required to exercise discretion; and second, concern that making executive officials susceptible to personal liability under such circumstances would result in less than "fearless administration" of their responsibilities[84]—that unfounded litigation would harass the employees and result in a deflection of energy away from the employee's public duties.

Another avenue for analogizing executive immunity to judicial immunity has been the characterization of legally imposed duties as quasi-judicial.[85] Similarly, the common law

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82. The absolute immunity afforded judicial officers was established early at common law. Yates v. Lansing, 5 Johns 282 (N.Y. 1810). The Supreme Court in Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871), acknowledged the immunity of the judiciary to be a general principle of the highest importance. The judicial officer is to be "free to act upon his own convictions, without apprehension of personal consequences to himself." *Id.* at 347. A judge will be subject to liability only when he has acted in the "clear absence of all jurisdiction." *Id.* at 351.

In Stump v. Sparkman, 435 U.S. 349 (1978), the Court reaffirmed *Bradley's* delineation of judicial immunity. The Court in *Sparkman* held that a judge, in approving a sterilization petition for tubal ligation on a minor, was immune from damages liability under section 1983 even if his approval of the petition was in error.

83. Spalding v. Vilas, 161 U.S. 483, 498 (1896). In *Spalding* the Court sustained a demurrer to a complaint for malicious defamation against the Postmaster General. The decision found the immunity question to be whether an executive official could be held personally liable for an act "not unauthorized by law, nor beyond the scope of his official duties." *Id.* at 493. The activity producing the defamation was held to be within the scope of the Postmaster's official duties and that the motives of the defendant were immaterial. *Id.* at 499.

For an analysis of whether the analogy is justified, *see* Handler & Klein, *The Defense of Privilege in Defamation Suits Against Government Executive Officials*, 74 HARV. L. REV. 44, 53-64 (1960).

84. 161 U.S. at 495-98. This same rationale was advanced by Judge Learned Hand in denying a plaintiff a forum:

> [T]o submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.

Greorie v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950)(Justice Department officials should be absolutely immune from both common law and constitutional tort causes of action for false imprisonment).

For a survey of post-*Spalding* lower court decisions, *see* Becht, *The Absolute Privilege of the Executive in Defamation*, 15 VAND. L. REV. 1127, 1137-43 (1962).

85. As it pertains to governmental immunity, the term "quasi-judicial" initially was synonymous with "discretionary" and thus indicative of conduct on which no cause of action could be maintained. *See* 2 I. F. HARPER & F. JAMES, THE LAW OF TORTS § 29.10, at 1638-39 (1956). Subsequently, the term referred to those officers

absolute immunity of prosecutors from liability for malicious prosecution is based on considerations like those justifying absolute immunity for the judiciary.[86] Yet the shield of absolute immunity is specifically limited to the prosecutor's quasi-judicial role as advocate.[87] This leaves open the question of immunity for prosecutors acting in executive roles as administrators or investigators[88] where the inhibitory effects of partial immunity might not be found as harmful.

A state prosecuting attorney is immune from a section 1983 suit alleging the deprivation of constitutional rights.[89] This is so in light of the concern on the part of the courts that a qualified immunity standard for prosecutors might jeopardize the integrity of the judicial process itself.[90] For example, a prosecutor's fear of liability might discourage him from using a witnesses whose credibility was in doubt, thereby depriving the jury of potentially relevant evidence. Also, judicial review of criminal convictions might be affected by linking the possibility that a ruling favoring the convicted would result in a suit against the prosecutor.

Expansion of absolute immunity represents a deviation from the balancing approach utilized in the section 1983 cases. While these cases are distinguishable due to the nature of the official function involved, they form a counterpoint to the trend of holding public officials accountable for the infringement of basic constitutional rights.[91] Immunity should be read against the background of tort law. When a prosecu-

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whose duties aligned them more closely with the judicial process than with the executive branch.

86. Imbler v. Pachtman, 424 U.S. at 421-24. The Court addressed whether a state prosecuting attorney is immune from a section 1983 suit alleging the deprivation of constitutional rights. The Court recognized the hybrid nature of the prosecutor's office by distinguishing his executive roles of investigator and administrator from his quasi-judicial role as advocate. *Id.* at 430-31. The Court held that a prosecuting attorney "in initiating a prosecution and in presenting the State's case" is absolutely immune from liability under section 1983. *Id.* at 431.

87. *Id.* at 430-31.

88. *See* text accompanying notes 131-34 *infra.*

89. 424 U.S. at 431. *See* note 86 *supra.*

90. *See* Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 HARV. L. REV. 922, 956 n.171 (1976) (noting that *Imbler* was bottomed on broad policy considerations rather than any notions that state immunity was applicable to its agents).

91. *See, e.g.*, Martin v. Merola, 532 F.2d 191, 198 (2d Cir. 1976)(Lumbard, J., concurring).

tor purposefully solicits and uses perjured testimony,[92] withholds exculpatory evidence, or otherwise misuses his office, any shield from a damage remedy can lead to unconstitutional results.[93] As even *Wood's* reasonable school board member is held to possessing a pool of knowledge that includes an elementary awareness of the law,[94] certainly a prosecutor should be held to that same standard in light of the nature of his responsibilities and knowledge of constitutional principles.

*"Due Care" and "Discretionary" Immunity*

Until 1946, most private greivances against the federal government outside the contractual area were redressed—if at all—only by the passage of private bills through Congress.[95] In 1946, the United States broadened its own liability considerably by passage of the Federal Tort Claims Act[96] that permitted recovery against the government for the negligent acts of its employees "to the same extent as a private individual."[97] Courts often ignore the compensatory purpose of the Act and instead apply, often with little justification, the defenses of "due care" and "discretionary" immunity:

> Any claim based upon an act or omission of an employee of the Government, *exercising due care,* in the execution of a statute or regulation, whether or not such statute or regulation be valid, *or* based upon the exercise or performance or the failure to exercise or perform a *discretionary function or duty* on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.[98]

Because negligent torts by definition do not involve the exer-

92. *See* Tate v. Grose, 412 F. Supp. 487 (E.D. Pa. 1976) (*Imbler* controlling even though perjured testimony was both solicited and used).

93. *See* Duba v. McIntyre, 501 F.2d 590 (8th Cir. 1974), *cert. denied,* 424 U.S. 975 (1976)(city attorney detained plaintiff in jail in order to sell his entire stock of hogs to satisfy a $55 misdemeanor fine).

94. *See* text accompanying notes 37-39 *supra.*

95. *See generally* Holtzoff, *The Handling of Tort Claims Against the Federal Government,* 9 LAW AND CONTEMP. PROB. 311 (1942); Note, *Tort Claims Against the United States,* 30 GEO. L.J. 462 (1942).

96. 28 U.S.C. §§ 2671-2680 (1970 & Supp. V 1975)(originally enacted as Act of Aug. 2, 1946, ch. 753, 60 Stat. 842). For a discussion of the Act's enactment, *see* 1 L. JAYSON, HANDLING FEDERAL TORT CLAIMS: ADMINISTRATIVE & JUDICIAL REMEDIES § 60 (1979).

97. 28 U.S.C. § 2674 (1975).

98. 28 U.S.C. § 2680(a) (1975)(emphasis added).

cise of "due care," there have been few cases interpreting that clause.[99]

Unlike the "due care" defense, the "discretionary function" clause has been extensively litigated[100] and analyzed.[101] The exception is intended to keep vital government operations from being obstructed and to protect the executive branch from too close a scrutiny of policy decisions. As the Eighth Circuit once observed in defense of the doctrine:

> The Congress had a sound basis for the use of the words in the Exceptions of the Act and used them in recognition of the separation of powers . . . and the considerations of public policy which have moved the courts to refuse to interfere with the actions of officials at all levels of the executive branch who, acting within the scope of their authority, were required to exercise discretion of judgment.[102]

While relying on the separation of powers doctrine is proper when it seeks merely to maintain essential flexibility of executive decision making free from tort liability for every error in judgment, no comparable freedom should exist for the government to plan or approve deliberate torts or attacks on private freedoms.

In *Barr v. Matteo*,[103] the plurality opinion delineated the test to be applied in deciding whether a federal official is im-

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99. In Hatahley v. United States, 351 U.S. 173 (1956), Navajo families sued the federal government to recover damages for the destruction of their horses. Apparently, federal agents, who wished the Navajos to leave their homesites, had used an "abandoned horse" statute to round up and destroy the animals. *Id.* at 175-76. In analyzing the section 2680(a) exclusions, the Court stated:

> The first portion of section (a) cannot apply here, since the government agents were not exercising due care in their enforcement of the federal law. "Due care" implies at least some minimal concern for the rights of others. Here, the agents proceeded with complete disregard for the property rights of the petitioners.

*Id.* at 178.

100. *See, e.g.*, United States v. Union Trust Co., 350 U.S. 907 (1955) (per curiam); Indian Towing Co. v. United States, 350 U.S. 61 (1955); Dalehite v. United States, 346 U.S. 15 (1953).

101. *See, e.g.*, James, *The Federal Tort Claims Act and the "Discretionary Function" Exception: The Sluggish Retreat of an Ancient Immunity*, 10 U. FLA. L. REV. 184 (1957); Peck, *The Federal Tort Claims Acts: A Proposed Construction of the Discretionary Function Exception*, 31 WASH. L. REV. 207 (1956); Reynolds, *Discretionary Function Exception of the Federal Tort Claims Act*, 57 GEO. L.J. 81 (1968).

102. Coates v. United States, 181 F.2d 816, 818 (1950).

103. 360 U.S. 564 (1959).

mune. That opinion first focused on an examination of the relation between the act complained of and matters within the realm of the official's responsibility, rather than his title or place in the federal hierarchy. Then, if the official's discretionary acts are "within the outer perimeter of [his] line of duty," the doctrine of executive immunity must be applied despite an allegation of malice.[104] Thus, the focus is on the decisional process. The principle of executive immunity as enunciated in *Spalding v. Vilas*[105] to shield heads of executive departments was extended by *Barr* to include officers of lower rank in the executive hierarchy. Regardless of motive, absolute immunity from liability for damages from defamation and kindred torts was granted to employees exercising discretion, if these discretionary acts were related to matters committed by law to the official's control or supervision.

Because of this discretionary immunity, *Barr* represents an important point in the development of liability. In the aftermath of *Barr*, the Court considered executive liability under the section 1983 cases.[106] In these later decisions, the Court's test balanced the need for effective governmental functioning against the protection of the litigant's constitutional interests. Implementation of this balancing test required the Court to look at the circumstances of each case in order to determine whether absolute immunity would increase the official's ability to act without undue constraint as to justify the deprivation of the plaintiff's rights.

As the opinions in *Bivens*, *Barr*, and the section 1983 cases demonstrate, two possible approaches to the law of executive liability for constitutional torts have developed. The first approach grants absolute immunity if the acts performed are discretionary and within the scope of the executive's duty. The second approach requires the performance not only of discretionary acts, but includes both a good faith-reasonable grounds basis for the action and a balancing of the litigant's constitutional interest against the government's interest in functioning effectively through its officers. It is against this immunity/liability dichotomy that *Butz v. Economou* was decided.

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104. *Id.* at 575.

105. 161 U.S. 483 (1896). *See* text accompanying notes 82-84 *supra*.

106. *See* text accompanying notes 21-41 *supra*.

STRUCTURING FEDERAL EXECUTIVE IMMUNITY

The decision in *Butz v. Economou*[107] answered the immunity question left unresolved by *Bivens*.[108] The direction offered by the Court was that federal executive immunity should "reconcile the plaintiff's right to compensation with the need to protect the decisionmaking process of an executive department."[109] In pointing out that federal officials "enjoy no greater zone of protection" for constitutional torts than state officers,[110] the Court held certain federal officers to the same qualified "good faith-reasonable grounds" immunity advanced in the section 1983 cases.

Because this qualified immunity turns on a quantum of discretion and responsibility, the Court held that some administrative officials, particularly those performing adjudicatory functions, would be absolutely immune from suit. This class of officials included executive personnel performing quasi-judicial functions, advocates responsible for the decision to prosecute, and agency attorneys presenting evidence during a proceeding.[111]

The *Butz* decision arose when Earl Butz, then-Secretary of Agriculture, issued an administrative complaint alleging that Arthur N. Economou and his commodity trading company had failed to maintain the minimum capital balance required by the Commodity Exchange Act.[112] After a hearing before an Agriculture Department examiner, a recommendation was issued that Economou's registration be revoked.[113] In response, Economou sought injunctive relief and damages against members of the Department of Agriculture, including the Secretary, the Chief Hearing Officer, and prosecuting counsel. The complaint alleged that these individuals had maliciously instituted the above proceedings to retaliate against Economou's outspoken criticism of the Department's regula-

107. 438 U.S. 478 (1978).

108. *See* text accompanying notes 63-64 *supra*.

109. 438 U.S. at 503.

110. *Id.* at 501.

111. *Id.* at 508, 515-17.

112. 17 C.F.R. § 1.17 (1979).

113. Because the agency had initiated its proceeding without first issuing a required warning letter, the court of appeals set aside the enforcement order as erroneous. Economou v. United States Dep't of Agriculture, 494 F.2d 519 (2d Cir. 1974)(per curiam).

tion of commodity trading.[114] Economou asserted that the officers had "discouraged and chilled a campaign of criticism directed against them, and thereby deprived [Economou] of his rights to free expression guaranteed by the First Amendment of the United States Constitution."[115]

The district court, concluding that the alleged conduct was within the officials' scope of authority[116] and involved the exercise of discretion, dismissed the complaint. On appeal, the Second Circuit affirmed the dismissal as to the Department, but reversed as to the individual defendants.[117] The court of appeals reasoned that the officers were protected by the defense of good faith and reasonable grounds as advanced in *Bivens* and the section 1983 cases.

The Supreme Court's decision in *Butz* structured two levels of constitutional tort immunity for executive officials. At the first level, officials, regardless of their rank or scope of responsibilities, are entitled to only a qualified "good faith-reasonable grounds" immunity. The second level affords absolute immunity to those officials performing quasi-adjudicatory functions within a federal agency.

*Qualified "Good Faith/Reasonable Grounds" Immunity*

In structuring a defense to liability, the *Butz* majority focused on two considerations for establishing a qualified immunity: First, the limits controlling law places on a federal official enforcing a statute; and second, the rationale behind the section 1983 qualified constitutional tort immunity.[118] In discussing the first consideration, the opinion distinguished several decisions, notably *Spalding*[119] and *Barr*,[120] by finding that

114. 438 U.S. at 482-83.

115. *Id.* at 483.

116. Relying on *Barr* and *Spalding*, the government had contended that all of the defendant officials were absolutely immune from any damages liability. This was allegedly so "even if in the course of enforcing the relevant statutes they infringed [Economou's] constitutional rights and even if the violation was knowing and deliberate." *Id.* at 485.

117. Economou v. United States Dep't of Agriculture, 535 F.2d 688 (2d Cir. 1976).

118. It is interesting to note that the majority employed cases refusing to impose liability in order to establish that absolute immunity never existed, stating that the law of privilege has "in large part been of judicial making." 438 U.S. at 501-02 (citing Barr v. Matteo, 360 U.S. at 569).

119. *See* text accompanying notes 82-84 *supra*.

120. *See* text accompanying notes 51-65 *supra*.

did not immunize conduct that ignored or erroneously applied constitutional or statutory limitations on authority.[121] For an official to make out his defense, he must show that his authority was sufficient in law to protect him. Applying the rationale advanced in *Ex parte Young*,[122] there can be no absolute immunity defense for a constitutional tort since an unconstitutional act can never be authorized by law or statute.[123]

The majority then addressed the second consideration: the purposes of the section 1983 qualified immunity.[124] Here the Court put to rest any lingering distinctions in liability for constitutional torts between state executive officials and officers at the federal level. Both types of claims serve the same function in protecting citizens from violations of their constitutional rights by government officials.

After deciding that a qualified immunity was appropriate, the Court then considered whether the level of immunity would be dependent upon the official's position in the federal hierarchy. The broad range of discretion exercised by these executives and the public interest in the vigorous discharge of official responsibilities must be balanced against the necessity of providing redress for citizens whose constitutional rights have been violated. In *Butz*, the majority drew heavily upon

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121. 438 U.S. at 489.

122. *See* text accompanying note 19 *supra*.

123. In his dissent to the qualified immunity *Butz* established for executive officials, Justice Rehnquist was joined by Chief Justice Burger and Justices Stewart and Stevens. The dissent suggested two "evils" were let loose by permitting a civil damages action against federal officials. The first "evil" would be an "impairment of the ability of responsible public officials to carry out the duties imposed upon them by law." 438 U.S. at 530. The second "evil" is that the future of qualified immunity in the courts will result in "a necessarily unprincipled and erratic judicial 'screening' of claims . . . and adherence to the form of the law while departing from its substance." *Id.*

The difficulty with the approach advanced by the dissent is its overconcern with the degree to which an active court is likely to increase the drain on the public treasury and curb executive enthusiasm. *See* Van Alstyne, *Governmental Tort Liability: A Public Policy Prospectus*, 10 U.C.L.A. L. REV. 463, 531-32 (1963). As long as government can anticipate liability with some certainty and make financial preparations through insurance systems of budgetary allotments, the courts will not be required to choose between compensating injured parties and protecting governmental activity from debilitating impairment as though these were mutually exclusive goals. By using an official's job scheme within a bureaucratic system to insulate his actions from constitutional review, the dissent is turning its back on permitting the courts to develop standards within their traditional role of adjudicating rights when these rights are brought into question.

124. *See* text accompanying notes 19-50 *supra*.

the rationale suggested by the section 1983 decisions: "In situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees."[125] In so balancing, the Court held federal executive officials to an immunity of subjective good faith and objective reasonable grounds. Particularly important, the Court "insisted on an awareness of clearly established constitutional limits" in the official's action or decision.[126] Notably, this was the same defense employed in *Wood v. Strickland* for evaluating objective reasonableness of the agent's conduct.[127]

If an official desires absolute immunity from constitutional torts, the *Butz* decision does permit him to demonstrate that public policy requires this complete exemption.[128] The ability of federal courts to determine the appropriate level of executive immunity should be guided by the presence of congressional authorization for suit. Absent congressional action, the court should first determine if the plaintiff is entitled to a damage remedy; second, decide if the court itself is qualified to handle the claim; and finally, balance considerations of public policy in protecting the allegedly responsible official's ability to make and implement decisions with the interest of the harmed individual in being compensated.[129] In performing this last step, the court should recognize "that it is not unfair to hold liable the official who knows or should know he is acting outside the law . . . ."[130]

The important points of that aspect of the Court's decision structuring a damage remedy are diminished by what is left out. Are participating supervisory personnel liable for unconstitutional action? Does the failure of such personnel to prevent institutional disregard for the rights of individuals allow a cause of action? If supervisory personnel fail to apprise subordinates of the unconstitutionality of a statute of regulation, does an action against the supervisor arise if the unconstitutional legislation is enforced? Are government units liable when the official causing the constitutional violation was grossly negligent and cannot be identified? While these ques-

125. 438 U.S. at 506.
126. *Id.* at 506-07.
127. *See* text accompanying notes 37-39 *supra.*
128. 438 U.S. at 506.
129. *Id.* at 503.
130. *Id.* at 506.

tions will be dealt with in the final section of this comment, a significant corollary question was asked and answered by the *Butz* decision: In this balancing process, does the policy of deterring unconstitutional official action weigh as heavily as the goal of minimizing judicial interference?

*An Absolute Immunity*

While holding that a qualified immunity should be the rule, in *Butz* the Court found that some of the defendants performed special functions requiring absolute immunity. Here a unanimous court reasoned that "[t]he cluster of immunities protecting the various participants in judge-supervised trials stems from the characteristics of the judicial process rather than its location."[131] Thus, an agency adjudication shares enough of the characteristics of the judicial process, including its adversarial nature and many of the same procedural safeguards, so that those officials participating in the process should be immune from damage suits. Executive officials then, who take part in agency adjudications as judges, advocates, and witnesses are afforded a full exemption from liability in order to function "without harassment and intimidation."[132] These officials include federal hearing examiners, administrative law judges, those officials responsible for the decision to initiate or continue an administrative proceeding, and those agency attorneys arranging for the presentation of administrative evidence.[133] The Court felt that the risk of an unconstitutional act was outweighed by the importance of preserving the official's independent judgment and that the defendant had sufficient remedies in such a hearing to serve as "checks on agency zeal."[134]

This allowance of absolute immunity is an ineffective deterrent to unconstitutional conduct by federal officers. Resolving the immunity question in this fashion bases liability upon the functions and responsibilities of the defendant rather than the purposes of the constitutional tort action. Ignoring the

131. *Id.* at 512. This part of the court's decision was based on: Imbler v. Pachtman, 424 U.S. 409 (1976); Yaselli v. Goff, 275 U.S. 503 (1927); Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871). *See generally* Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 COLUM. L. REV. 463 (1909).

132. 438 U.S. at 512.

133. *Id.* at 513-17.

134. *Id.* at 516.

misuse of power by those clothed with quasi-judicial authority establishes a nearly insurmountable barrier to the recovery of damages in actions like *Butz*. The reasonableness of any executive's belief in the constitutionality of his action should play a role in determining the extent of his liability.

Administrative tribunals are not courts. Officers engaged in these proceedings frequently promulgate the policies they later enforce. Because recognition of an immunity necessarily undercuts one of the central purposes of the constitutional tort action, compensation to victims, those seeking to obtain immunity should have the burden of establishing why this purpose should be disregarded. By placing the office above the Constitution because of a stated policy of fairness to the official, the *Butz* Court allows a greater unfairness since damages are denied to the victim of the constitutional deprivation.

## THE SEARCH FOR A STANDARD FOR JUDICIAL REVIEW

As the history of executive liability and the recent decision in *Butz* point out, the counterproductive nature of executive immunity from constitutional torts can be cured if courts will recognize their inherent capacity for deciding constitutional disputes. This involves devoloping justiciable good faith-reasonable grounds standards by weighing the interests involved within the fact-law pattern of a given case before the court. The range of interests includes those of the litigants, the public, and the executive branch.

Fairness to the injured party, while a primary goal, cannot be achieved in a vacuum. In analyzing the true nature of the constitutional deprivation, there must be conscious effort to isolate the precise right that has been injured.[135] The public interest is paradoxical precisely because it is difficult to strike the appropriate balance between the individual and the state when the costs to one meet head-on with the goals of the other.

What are the effects on the executive official who must answer for constitutional deprivations? The harm resulting from such conduct is often more easily avoided than the harm caused by simple negligence, so if the threat of personal liabil-

135. "A moderately canny pleader . . . [will] be able, in framing the issues, to describe much allegedly tortious official conduct in constitutional terms." W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 353 (6th ed. 1974).

ity serves some deterrent purpose, its imposition would seem particularly useful expecially where constitutional violations are concerned. Even if such conduct cannot readily be eliminated, it does not follow that the public should have to pay for its consequences.

The sections below will analyze three important considerations for a case-by-case development of constitutional tort standards: 1) Is the imposition of liability based upon a theory of compensation or deterrence? 2) Who will ultimately pay for the liability? 3) Should the next step be to attempt to attach liability to the "negligent" governmental organization?

*Compensation or Deterrence*

Consideration must be given to the compensatory concerns of the constitutional tort. These concerns are best examined in light of one stated purpose of section 1983. "[T]he basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights. . . ."[136] Damages are available for actions found "to have been violative of . . . constitutional rights and to have caused *compensable* injury. . . ."[137]

A study of lower federal court decisions demonstrates the application of this compensatory purpose.[138] For example, the decision in *Carey v. Piphus* held that "in order to further the purpose of § 1983, the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right. . . ."[139] Moreover, that decision pointed out that the

136. Carey v. Piphus, 435 U.S. 247, 254 (1978)(students suspended from school without procedural due process only entitled to recover nominal damages against school officials absent proof of actual injury).

137. Wood v. Strickland, 420 U.S. at 319 (emphasis added); *see* Codd v. Velger, 429 U.S. 624, 630-31 (1977) (Brennan, J., dissenting).

138. *See, e.g.,* United States *ex rel.* Tyrrell v. Speaker, 535 F.2d 823 (3rd Cir. 1976); United States *ex rel.* Larkins v. Oswald, 510 F.2d 583 (2nd Cir. 1975); Magnet v. Pelletier, 488 F.2d 33 (1st Cir. 1973); Donovan v. Reinbold, 433 F.2d 738 (9th Cir. 1970).

For discussions of the problems of fashioning damage awards under section 1983, *see generally* McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections,* (pt. 1), 60 VA. L. REV. 1, 55-66 (1974); Yudof, *Liability for Constitutional Torts and the Risk-Averse Public School Official,* 49 S. CAL. L. REV. 1322, 1366-83 (1976); Comment, *Civil Actions for Damages Under the Federal Civil Rights Statutes,* 45 TEX. L. REV. 1015, 1023-35 (1967).

139. 435 U.S. 247, 258-59 (1978).

"elements and prerequisites for recovery of damages . . . caused by the deprivation of one constitutional right are not necessarily appropriate to compensate injuries caused by the deprivation of another."[140]

Compensation should be contrasted with the true deterrent effect of the good faith-reasonable grounds requirement. Executive officials will be forced to make a stronger preliminary showing that their activities were within the scope of their duties and were of a quality to justify immunization from suit. As the decisions supporting executive immunity make clear, the import of the doctrine is to immunize the official not from liability as much as from the necessity of defending his action in court. The threshold questions as to the availability of the immunity defense are often unanswerable without a full evidentiary hearing. The courts will require, at a minimum, affidavits properly setting forth the defendant's reasons for making the decision to act.

The deterrent impact of a constitutional tort judgment can be limited. First, because it only affects constitutional violations, the tort action offers no specific deterrence against the official when the individual's rights do not rise to constitutional dimensions. Second, an action in constitutional tort can deter only to the extent that clear rules for future conduct are formulated. Officials have often criticized the courts for lack of clarity and direction in constitutional decisions.[141] Third, the vindication of constitutional rights presently fails to take into account the organizational context of executive actions by not addressing isolated individual conduct rather than department-wide policy. An official cannot be expected to respect constitutional rights if his agency encourages violations.

To fully appraise the deterrent effect of tort liability, the court should also take into consideration the effect on governmental entry into socially desirable areas of activity. The continuous threat of exposure to damages could dampen an official's enthusiasm in the performance of his duty.[142] With the section 1983 decisions requiring that, in addition to an official's subjective good faith, a reasonable basis for the official's

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140. *Id.* at 264-65.

141. Members of the Supreme Court have also recognized "the hazard of even informed prophecy as to what are 'unquestioned constitutional rights.'" Wood v. Strickland, 420 U.S. at 324 (Powell, J., dissenting).

142. Green v. James, 473 F.2d 660 (9th Cir. 1973).

conduct must exist, liability attaches whether the resulting consequences are a physical invasion of the individual's person or an intangible infringement of a procedural right.

A useful discussion of the compensation-deterrence balance is found in the concurring opinion of Justice Harlan in *Bivens*.[143] He looked to the federal court's "inherent equitable powers" to relieve violations of the Constitution.[144] It is then only necessary that there be a federally protected interest: "[I]t must also be recognized that the Bill of Rights is particularly intended to vindicate the interest of the individual in the face of the popular will as expressed in legislative majorities. . . ."[145] Because the general federal question jurisdiction allowed a federal court to grant equitable relief in any case within that jurisdiction, Justice Harlan concluded that the same jurisdictional statute should suffice to permit a federal court to utilize traditional legal remedies. In assessing the appropriateness of affording Bivens compensatory relief, Justice Harlan noted that the decision did not depend solely on the deterrent effect of imposing liability, but might instead be based either on the need for compensation or the "nature of the personal interest asserted."[146] Thus, to Justice Harlan, it seemed that neither the source of the right (the Constitution) nor the nature of the remedy (damages) would require that the judiciary await legislative authorization before effectuating the remedy necessary to vindicate the right.[147]

By making the governmental entity vicariously liable for the negligence of its officials, the public equivalent of *respondeat superior,* but denying the right of indemnification against the official for his negligence, the decision to allow liability could then depend upon the likelihood that the behavior in question is deterrable. To resolve the damages issue, the core purpose of constitutional tort needs clarification. If that

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143. 403 U.S. at 398. Harlan viewed *Bivens* as broadly applicable:

> I am of the opinion that federal courts do have the power to award damages for violation of "constitutionally protected interests" and . . . that a traditional judicial remedy such as damages is appropriate to the vindication of the personal interest protected by the Fourth Amendment.

*Id.* at 399 (Harlan, J., concurring).

144. *Id.* at 404 (Harlan, J., concurring)(quoting Textile Workers v. Lincoln Mills, 353 U.S. 448, 460 (1957)(Burton, J., concurring in result)).

145. 403 U.S. at 407.

146. *Id.* at 409 n.10.

147. *See* Dellinger, *supra* note 45, at 1543.

purpose is compensatory, little justification exists in forcing the plaintiff to seek redress from an individual defendant who is likely to have a shallow pocket. Having granted the tortfeasor a scope of employment including discretionary authority, there is no logical impediment to holding the government ultimately liable for the officer's acts, especially when the alternative is to leave the harm uncompensated. If its purpose is to recognize deterrence, constitutional liability may provide an incentive for employers to clarify and restrict the boundaries in which discretion might be exercised. Thorough supervision, carefully delineated organizational policy, and even selective employment habits may result from the possibility of deterrent liability.[148] "When [a constitutional right] is denied, the victim is entitled to compensation and the public is entitled to the deterrent effect. . . ."[149]

*Allocation of Liability*

In situations in which both the government and the individual official are sued for torts committed by the official while acting within the scope of his authority, the problem remains of deciding whether and to what extent apportionment of damages or contribution is appropriate.[150] Even though his conduct resulted in a constitutional deprivation, the official

148. In Rizzo v. Goode, 423 U.S. 362 (1976), plaintiffs, representing a class of Philadelphia citizens, brought an equitable action under section 1983, alleging that Philadelphia police systematically mistreated minority citizens. The district court ordered the police department to improve the system for citizens' complaints and to set regulations for police-citizen encounters. The Supreme Court overturned the decision, noting that the defendants were high-level city officials, not the police officers who had allegedly deprived minorities of their constitutional rights. As these petitioners were only nominally in charge of the police department, there was no showing that petitioners approved or knew of the misconduct of the individual officers. Also, respondents lacked standing to sue because they did not show that refusing to grant equitable relief would have resulted in continuing harm to the respondents themselves. *Id.* at 371.

Applying *Rizzo* to constitutional tort actions, the decision might be construed as a bar to injunctive relief attempting to deter continuation of allegedly unconstitutional conduct by a federal organization. *Rizzo* could easily be distinguished where the unconstitutional conduct sought to be enjoined was sanctioned by state law. *See* Tucker v. City of Montgomery, 410 F. Supp. 494, 508 (M.D. Ala. 1976).

149. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 461 (1978).

150. *See* United States v. Yellow Cab Co., 340 U.S. 543 (1951) (a joint tortfeasor may sue the United States for contribution under the Federal Tort Claims Act); 1 & 2 I. F. HARPER & F. JAMES, THE LAW OF TORTS §§ 10.1, 10.2, 20.3 (1956).

may have acted in whole or in part beyond the scope of his authority, and to that extent he should be exclusively liable.

Matters become more complex when the government is directly rather than vicariously liable, as in the instances where it breaches an independent duty to supervise officials or where the deprivation complained of is basically systemic in character. Pragmatically, the cost of unconstitutional conduct of this nature should be spread among the taxpayers, who reap the benefits of government and are ultimately responsible for it. This is particularly true when the responsibility for the deprivation is disbursed among various governmental departments rather than focused in the officer who operates most directly on the plaintiff.

The Federal Tort Claims Act does not permit either the negligent official[151] or the United States[152] a right to indemnify against the other. This may create difficulty for a defendant when recovery in certain constitutional tort cases is more reflective of the jury's judgment that future violations need to be deterred, rather than recognition of the gravity of the plaintiff's injury.

While the United States Department of Justice will offer a federal official the free services of its attorneys for legal defense, provided he was acting within the scope of his authority at the time the injury occurred,[153] the Department has taken the view that paying certain tort judgments of federal officials might be an unauthorized expenditure of public funds.[154] Yet, the federal government will be "independently liable" whenever a federal law enforcement agent injured the public "while

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151. Uptagrafft v. United States, 315 F.2d 200 (4th Cir. 1963), *cert. denied*, 375 U.S. 818 (1963).

152. United States v. Gilman, 347 U.S. 507 (1954).

153. *See* 42 Fed. Reg. 5695-96 (1977). The legal basis for this policy statement is a statute reserving to the Justice Department authority over "the conduct of litigation in which the United States, an agency, or official thereof is a party, or is interested . . . ." 28 U.S.C. § 516 (1970).

154. *See Supplemental Appropriations, Fiscal Year 1977: Hearings on H.R. 4877 Before Senate Subcomm. on Appropriations*, 95th Cong., 1st Sess. 861 (1977). *See also* Martinez v. Schrock, 537 F.2d 765 (3d Cir. 1976), *cert. denied*, 430 U.S. 920 (1977)(military doctors have absolute immunity from medical malpractice suit due to their modest incomes and their lack of indemnification from the government).

In an action under section 1983, "the Court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988 (1976), *as amended by* Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641.

acting within the scope of his employment or under color of Federal law."[155]

The definition of a right of action against an official turns, in important part, on the degree to which it can be pursued. Some alternatives to constitutional tort liability include a system of administrative discipline;[156] "oversight—by the press, by Congress, the public, and by internal agency personnel";[157] or isolation, for separate treatment, of the issues related to deterrence and compensation.[158] The difficulty with these suggestions is that the citizenry has as much interest in preventing constitutional misconduct as in compensating those injured. No system should be adopted simply because it is an expedient means of compensating the victims of government-inflicted harm. Society has a right to insist that when officials commit constitutional violations they do so at their own risk.

*The "Negligent" Governmental Organization*

A characteristic of bureaucracy is its hierarchical structure of authority. This structure, coupled with the organization's rules and regulations, is designed to allow specialization, coordination, and control within the unit.[159] The effect is to reduce the significance of the individual and enhance the importance of the organization.[160] This characteristic suggests that, because an organization may exert considerable control over the conduct of those affiliated with it, the organization should be seen as a responsible entity in its own right.[161]

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155. S. REP. No. 588, 93d Cong., 1st Sess. 3-4 (1973).

156. R. VAUGHN, THE SPOILED SYSTEM 154, 162 (1975). Federal law authorizes disciplinary action against federal employees "for such cause as will promote the efficiency of the service." 5 U.S.C. § 7501(a)(1976). Sanctions available at the federal level include removal, suspension, leave without pay and reduction in rank or pay. 5 U.S.C. § 7511(2)(1976).

157. Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Inst., 566 F.2d 289, 305 (D.C. Cir. 1977)(en banc)(Wilkey, J., concurring).

158. *See generally* Foote, *supra* note 58, at 514-15.

159. *See* P. BLAU & W.R. SCOTT, FORMAL ORGANIZATIONS 32, 63 (1962).

160. M. WEBER, ECONOMY AND SOCIETY 217-18 (G. Roth & C. Wittich eds. 1968).

161. *See* Lehmann, *Bivens and its Progeny: The Scope of a Constitutional Cause of Action for Torts Committed by Government Officials*, 4 HASTINGS CONS. L.Q. 531, 575 (1977). Recently, the Supreme Court in Monell v. Dep't of Social Servs., 438 U.S. 658 (1978) partially overruled Monroe v. Pape, 365 U.S. 167 (1961), and held that local governments are not wholly immune from suit under section 1983. Justice Brennan, in his majority opinion, stated that the immunity formerly enjoyed by a

Federal organizations may be causally connected to a deprivation of constitutional rights. This connection need not take the form of direct participation or overt orders; more likely, officials merely tolerate misconduct in the ranks.[162] To hold such an organization liable for negligence would require a plaintiff to show a duty to act, a breach of that duty, and a causal connection between the breach and the plaintiff's injury.[163] Ascertaining a duty may be difficult when the superior is shown to have no knowledge of misconduct by subordinates.[164] Proof of such knowledge will often be difficult, as will

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local government is no longer available when such an entity is sued for alleged unconstitutional action resulting from an implementation or execution of a policy statement, custom ordinance, regulation, or decision officially adopted and promulgated by that body's officers. 438 U.S. at 690-91. However, the Court expressly held that a municipality cannot be held liable under section 1983 on a *respondeat superior* theory:

> [A] local government may not be sued under § 1983 for an injury inflicted *solely* by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

*Id.* at 694 (emphasis added). Accordingly, in the absence of an alleged constitutional tort caused by official municipal policy, a municipality is not a "person" within the meaning of section 1983.

162. Schnell v. City of Chicago, 407 F.2d 1084 (7th Cir. 1969), was an action for injunctive relief arising from alleged police misconduct during the 1968 Democratic National Convention. The appellate court reversed a dismissal for failure to state a cause of action stating:

> From a legal standpoint, it makes no difference whether the plaintiffs' constitutional rights are violated as a result of police behavior which is the product of the active encouragement and direction of their superiors or as a result of the superiors' mere acquiescence in such behavior. In either situation, if the police officials had a duty, as they admittedly had here, to prevent the officers under their direction from committing the acts which are alleged to have occurred during the Convention, they are proper defendants in this action.

*Id.* at 1086.

*See* Note, *The Federal Injunction as a Remedy for Unconstitutional Police Conduct*, 78 YALE L.J. 143, 147 (1968):

> [D]eliberately ordered violations of constitutional rights have not been the primary problem. Most frequently, unconstitutional searches, arrests, or other abuses of police authority cannot be traced . . . . Far more often, recurring violations are passively tolerated by those responsible for supervising the police department.

163. *See generally* Roberts v. Williams, 456 F.2d 819, 831 (5th Cir. 1972), *cert. denied*, 404 U.S. 866 (1971); Carter v. Carlson, 447 F.2d 358, 363 (D.C. Cir. 1971), *rev'd on other grounds sub nom.* District of Columbia v. Carter, 409 U.S. 418 (1973).

164. *See* Bracey v. Grenoble, 494 F.2d 566, 571-72 (3d Cir. 1974); Wright v. McMann, 460 F.2d 126, 134-35 (2d Cir. 1972), *cert. denied*, 409 U.S. 885 (1972).

the requisite link between the superior's breach and the deprivation of rights.[165]

The fact that liability is presently personal may allow an official to disclaim responsibility on the grounds that he had delegated the injurious task to intermediate officials. Arguably, the superior could be held liable only if the delegation itself was negligent and could be sufficiently linked to the injury. A reasonable standard of care and responsibility could allocate liability between the injured party and the government or some related public entity whose benefit is derived from the activity in question.

## CONCLUSION

Immunity cannot be justified by saying that fear of judgments will lead to undue timidity of public officials in carrying out their responsibilities. *Butz* clearly exculpates official actions taken in good faith and with reasonable grounds. Furthermore, private corporations have functioned without visible interference with operational success while bearing the load of substantial potential risk from general tort liability. There is no logical reason why the federal government, with equal opportunity to plan for losses and to buy insurance, could not likewise operate as effectively under conditions of liability.[166] In fact, the evidence from states in which immunity has been abolished shows the fears of expense to be unwarranted.[167]

Even if the arguments in favor of sovereign immunity were once valid, the relationship between the citizen and the government has changed so that immunity is now a dangerous

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If the probability of recurrence is sufficient, the problem point becomes whether the supervisors are in fact in a position within the hierarchy to prevent the deprivation.

165. *See* Newman, *supra* note 149, at 455:

> Providing for suit directly against the employing department or unit of government would accomplish more than simply informing the jury of a deeper pocket. It would enhance the prospects for deterrence by placing responsibility for the denial of constitutional rights on the entity with the capacity to take vigorous action to avoid recurrence.

166. Williams v. City of Detroit, 364 Mich. 231, 259, 111 N.W.2d 1, 24 (1961) (Black, J., concurring).

167. Van Alstyne, *Government Tort Liability: A Decade of Change*, 1966 U. ILL. L.F. 919, 969-78.

anachronism.[168] The damage resulting from the unconstitutional act of an official should be distributed amongst the community of citizens constituting the government, where it could be borne with less hardship, rather than imposed entirely upon the single individual who suffers the constitutional injury.

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168. *See* Sherry, *The Myth That the King Can Do No Wrong: A Comparative Study of the Sovereign Immunity Doctrine in the United States and New York Court of Claims*, 22 AD. L. REV. 39, 58 (1969):

> Sovereign immunity is at best a judicial protective device created to immunize a weak government against oppressive and insensitive citizen demands . . . . Today it is the citizen who is helpless in the face of growing governmental intrusion into his very life, often with unpredictable and tragic results . . . . [Sovereign immunity is] dangerous to our democratic institutions if allowed to exist untrammelled by controls appropriate to contain it.